83-825

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NO. _____

CENTRAL IOWA REFUSE SYSTEMS, INC.,

Petitioner,

vs.

DES MOINES METROPOLITAN AREA SOLID WASTE AGENCY, etc., et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THIS COURT'S STANDARD FOR EXEMPTING MUNICIPAL ACTIVITIES FROM THE ANTITRUST LAWS, THE PRESENCE OF A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY TO DISPLACE COMPETITION, IS SATISFIED BY A FINDING OF A "POSSIBLE INFERENCE" THAT THE LEGISLATURE CONTEMPLATED THE ANTICOMPETITIVE ACTIVITY COMPLAINED OF.

II. WHETHER A STATUTORY SCHEME WHICH (1) REQUIRES MUNICIPALITIES TO PROVIDE, BY MEANS NOT PROHIBITED BY LAW, FOR THE DISPOSAL OF SOLID WASTE, (2) ALLOWS MUNICIPALITIES TO JOIN TOGETHER FOR SOLID WASTE DISPOSAL PROJECTS, (3) PERMITS THE JOINTLY FORMED ENTITY TO ISSUE REVENUE BONDS TO FINANCE THE PROJECT, AND (4) GRANTS THE ISSUER SPECIFIC POWERS, NOT INCLUDING ANTICOMPETITIVE CONDUCT, TO INSURE PAYMENT OF THE BONDS, CONSTITUTES A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY THAT THE MUNICIPALITIES MAY PROHIBIT, AT BOND COUNSEL'S BEHEST, DISPOSAL OF SOLID WASTE AT PRIVATELY OWNED STATE-LICENSED SOLID WASTE DISPOSAL SITES COMPETING WITH THE JOINT PROJECT.

III. WHETHER ACTIVE STATE SUPERVISION IS REQUIRED OF MUNICIPAL ANTICOMPETITIVE ACTIVITY FOR SUCH ACTIVITY TO BE EXEMPT FROM THE ANTITRUST LAWS.

IV. WHETHER STATE POLICY TO DISPLACE COMPETITION MAY BE INFERRED IN THE ABSENCE OF ANY PROVISION FOR ACTIVE STATE SUPERVISION IN THE FACE OF THE IOWA SUPREME COURT'S REQUIREMENT THAT STATE SUPERVISION MUST BE PRESENT IF MUNICIPAL ANTICOMPETITIVE CONDUCT IS TO BE PERMITTED UNDER IOWA LAW.

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PARTIES TO THIS PROCEEDING

Central Iowa Refuse Systems, Inc. ("CIRS") is the only plaintiff. It has no parent companies, subsidiaries or affiliates.

The Defendants are as follows: The Des Moines Metropolitan Area Solid Waste Agency, the Town of Altoona, Iowa, the City of Ankeny, Iowa, the City of Bondurant, Iowa, the City of Clive, Iowa, the City of Des Moines, Iowa, the City of

Elkhart, Iowa, the City of Grimes, Iowa, the City of Mitchellville, Iowa, the City of Johnston, Iowa, the City of Norwalk, Iowa, the County of Polk, Iowa, the City of Runnells, Iowa, the City of Urbandale, Iowa, the City of West Des Moines, Iowa, the City of Windsor Heights, Iowa and the City of Polk City, Iowa.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is officially reported at 715 F.2d 419 and is attached as Appendix "A". The opinion of the United States District Court for the Southern District of Iowa is officially reported at 557 F.Supp. 131 and is attached as Appendix "B".

JURISDICTION

The opinion of the United States District Court for the Southern District of Iowa was filed on December 9, 1982. Plaintiff filed a timely notice of appeal, appealing the decision to the United States Court of Appeals for the Eighth Circuit. The opinion of the United States Court of Appeals for the Eighth Circuit was filed on August 26, 1983, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15.

§ 1. Trusts, etc., in restraint of trade illegal; penalty.

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding

one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Chapter 553, Code of Iowa.

553.4 Restraint prohibited. A contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market.

553.5 Monopoly prohibited. A person shall not attempt to establish or establish, maintain, or use a monopoly of trade or commerce in a relevant market for the purpose of excluding

competeition or of controlling, fixing, or maintaining prices.

The other statutes involved, Chapters 455B, 28E and 28F are attached as Appendix "C". All references are to the 1981 Code of Iowa. Chapter 455B has since been internally renumbered but has not otherwise significantly changed for purposes of this case.

STATEMENT OF THE CASE

CIRS is an Iowa corporation that operated a solid waste disposal site in Madison County, Iowa, 31 miles from the central business district of Des Moines. The waste disposal site operated by CIRS was closer to many parts of the Defendant cities than is the landfill operated by the Defendants. Prior to the actions complained of here, much of the waste deposited at CIRS' landfill came from the Des Moines metropolitan area. CIRS charged its landfill users a fee based on the quantity of waste disposed.

The Des Moines Metropolitan Solid Waste Agency ("Metro") was organized in July of 1969 by the defendant cities ("cities" and "municipalities" as used herein mean all the municipal defendants and Polk County) pursuant to Iowa Code Chapter 28E and Chapter 28F. Iowa Code Chapter 28E allows various municipalities to enter into agreements and create entities to do jointly what they have the power to do separately under the laws of Iowa. Iowa Code Chapter 28F permits the joint financing of certain public works projects, including solid waste facilities, by the issuance of revenue bonds.

In 1971, Metro planned and developed a solid waste landfill ten miles east of Des Moines, and pursuant to Iowa Code Chapter 28F, issued revenue bonds to fund its development. One million, five hundred thousand dollars ($1,500,000) was raised by the sale of solid waste disposal revenue bonds, issued October 1, 1972, for the establishment of the Metro solid waste disposal facility. On May 15, 1972, the cities entered into a Solid Waste Disposal Service Contract with Metro.

In the Solid Waste Disposal Service Contract, the members of Metro and Metro agreed that so long as any bonds of the Agency ("Metro") were outstanding, the member municipalities would not grant any franchise or license to any person to compete with the Metro operation and all solid waste generated within the members' jurisdictions would be disposed of at the Metro site. Sections 105 and 701 of the Solid Waste Disposal Service Contract provide:

> Section 105. Disposal. The Municipality does hereby agree, that to the full extent permitted by law, all Solid Waste generated from within its jurisdiction shall be disposed of at the Project.

Section 701. Non-Competitive Facilities. So long as any Bonds of the Agency are outstanding, the Municipality shall not grant any franchise or license to any person, firm, association or corporation for a competing solid waste disposal system, nor shall they permit any municipal solid waste disposal system to compete with the Agency. The Municipality may, without Agency consent, dispose of construction or demolition material, tree removal residue, decrepit automobiles and other nonputrescible solid waste generated out of the Municipality's own activities, in a disposal site apart from an Agency disposal site.

The Agency however shall have the right to establish, construct and acquire any other disposal project, provided, however, that no such other disposal project shall be so established, constructed or acquired unless the Consulting Engineers shall certify that such other disposal project will not be competitive with said Project constructed and acquired pursuant to the terms of the Resolution, and will not materially or adversely affect the revenue to be derived from said Project, or the rights and security of the holders of the Bonds issued pursuant to said Resolution.

These provisions were included in the Contract solely because bond counsel had advised the Defendants that such provisions should be included to make the revenue bonds saleable.

Pursuant to the Contract, the cities passed ordinances which require haulers to dispose of all solid waste collected within the member municipality at a facility operated by Metro. Some cities made it a crime to haul solid waste to any place other than Metro's facilities. Because of the agreement and the ensuing ordinances, those persons holding permits to haul solid waste are not allowed to haul such waste from the metropolitan area to the landfill operated by CIRS. CIRS, therefore, cannot compete with the Metro landfill with respect to any solid waste generated from within the Metro environs and is deprived of the revenue it had previously received from such solid waste.

CIRS brought this action alleging that the Defendants have illegally monopolized the disposal of solid waste in violation of § 2 of the Sherman Act and Iowa Code § 553.5. CIRS further alleged that the means by which the Defendants have achieved such monopoly, illegally

tying the issuance of a hauling permit to the purchase of Metro services and enforcing a boycott against any other sanitary landfill are themselves restraints of trade and per se violations of § 1 of the Sherman Act and Iowa Code § 553.4. Jurisdiction was founded on 28 U.S.C. § 1337, 15 U.S.C. §§ 15 and 26 and the doctrine of pendent jurisdiction.

The issue of liability was argued before the Honorable Judge William Stuart on a stipulation of facts.[1] Judge Stuart entered judgment for the Defendants, finding that the cities and Metro were exempt from application of the antitrust laws for the actions complained of here. He found that both parts of the state action exemption test set forth by this Court in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), had been met.

The Eighth Circuit affirmed, finding that it was possible to infer from the statutory scheme a state policy permitting

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[1]By the agreement of the parties, this case was bifurcated. The issue of damages was reserved for a later trial if the court found for the Plaintiff on the question of liability.

anticompetitive practices for financing solid waste disposal sites. It further determined that the second part of the Midcal test, active state supervision, was "unnecessary where the restraint represents governmental conduct in an area of traditional municipal activity." (Appendix "A", p. 30A).

REASONS FOR GRANTING THE WRIT

1. THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND SHOULD BE RESOLVED BY THIS COURT.

Governmental subdivisions are not immune as such from the antitrust laws. City of Lafayette v. Louisiana Power & Light Company, 435 U.S. 389 (1978). The Parker state action exemption, first enunciated in Parker v. Brown, 317 U.S. 341 (1943), applies only to activities of the state as sovereign or when there is a "clearly articulated and affirmatively expressed state policy to displace competition" and there is active state supervision of the activity. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) and Community Communications, Co. v. City of Boulder, 455 U.S. 40, 52 (1982). The question of how and when those standards

for the state action exemption apply to municipalities greatly concerns those adversely affected by cities' anticompetitive conduct, cities subject to those standards and the courts who, in conflicting opinions, have attempted to apply those standards.

When applied to cities, the "clearly articulated and affirmatively expressed" criterion may be satisfied when it is determined "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." Lafayette, supra, 435 U.S. 389 (1978). The confusion arises, however, as to what constitutes legislative "contemplation" of anticompetitive activities. For example, must a finding of such legislative contemplation be based on a proper conclusion that the permission to act in particular anticompetitive manner necessarily inheres in the power granted? Is it enough that, if not so necessarily inherent, the permission is the most reasonable inference to draw from the nature of the granted power? Or is it enough that the inference may be permissibly (not unreasonably) drawn from the

authority granted? Because state statutory authority is most generally silent with regard to anticompetitive municipal conduct, the answer to these questions are needed to properly confine cities anticompetitive behavior within the bounds of the exemption and to protect private enterprises competing with the cities.

The Ninth Circuit has taken the position that a strict standard is required in order to show state contemplation of anticompetitive activity. In Parks v. Watson, 716 F.2d 646, 663-64 (9th Cir. 1983) the Ninth Circuit stated:

> Klamath argues persuasively that merely demonstrating a state policy to displace competition with monopoly public service does not necessarily satisfy the additional requirement that the legislature contemplate the kind of action complained of.
>
> * * * *
>
> There is nothing in Chapter 523 which would allow us to infer that any authorization by the state to displace competition with city-run geothermal districts also includes authorization for a city to undertake anticompetitive action in its efforts to establish such a district.

According to the Ninth Circuit, state authorization to undertake an activity in an otherwise unlawful anticompetitive manner does not warrant the assertion that the legislature contemplated additional anticompetitive activity. A fortiori, mere authority to act in a certain area should not constitute authorization to act in any manner violative of the antitrust laws.

On the other hand, the Eighth Circuit has adopted a loose construction for what constitutes legislative contemplation, a construction which sanctions anticompetitive conduct without any authorization whatsoever. For example, in this case, the defendant municipalities have statutory authority, and were required, to provide for the disposal of solid waste by means "not prohibited by law". Section 455B.76, Code of Iowa (1981). They had statutory authority to join together to provide for solid waste disposal facilities. Chapter 28E of the Code of Iowa. They also had a statutory authority to issue revenue bonds to pay for the construction of the solid waste project. The statutes specifically detail the means by which they were permitted to raise the

funds to pay the bonds, but did not specifically authorize monopolization or other anticompetitive conduct. Chapter 28F, Code of Iowa. The statutes also provide for no state review of the economic impact of such projects.[2] This case presents the question of whether the municipalities' requirement that, for so long as the revenue bonds were outstanding, no solid waste could be disposed of at any project other than theirs, was contemplated by this statutory scheme.

The Eighth Circuit found that "there is no statute or other authority indicating that the Iowa legislature actually contemplated that the agency responsible for construction and operation of the landfill facility would have the exclusive

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[2]It would not have been difficult for the legislature to have provided for review of the impact of anticompetitive projects on the rest of the state, if it had indeed contemplated that the municipalities would undertake conduct in restraint of trade. The municipalities are required to submit their waste disposal plans for review of health and safety factors. The legislature could easily have provided that the plans likewise be reviewed for economic impact on surrounding areas.

right to dispose of solid waste produced in the Des Moines area or would engage in practices in restraint of trade." (App. A at 21-22). The court also admitted that it was required to engage in "some speculation" (App. A at 22) to find anticompetitive intent but decided "it is possible to infer the existence of an affirmative state policy" (App. A at 22) to displace competition.

The Iowa legislature, according to the Court, placed high priority on the disposal of solid waste. It empowered the municipalities to issue revenue bonds to finance the disposal sites. The Court inferred from this that the legislature intended the city to "have the latitude necessary to impose restrictions on competition if Metro believed such restrictions necessary to promote the sale of the bonds." (App. A at 27). The court distinguished this case from the case involving a cooperative effort of cities to issue revenue bonds to build a swimming pool, which is also authorized by Chapter 28F. Unless swimming pools are deemed "high priority projects" (App. A at 28), the same chapter providing for issuing

revenue bonds would not imply anti-competitive activity to make the bonds saleable.

The essence of the court's opinion is that if cities are given authority to undertake "important" government projects which can be funded through government bonds, the cities are free to undertake any anti-competitive measures they -- or their bond counsel -- deem necessary to sell these bonds. Thus, the standard for "contemplation" of anticompetitive policies is reduced or, indeed, almost nonexistent, for "important projects," and is stricter for less weighty projects. Such a two-fold standard based on the importance of the project affords no guidance and, in fact, adds another tier of confusion to what is already a confusing area of the law.

Not only does it make little sense if the application of the exemption depends on whether the authorized activity is "important", but the Eighth Circuit's interpretation is also contrary to the teachings of this Court. This Court has recognized that even "important" projects which the state may authorize to be operated on a monopoly basis may run afoul

of the antitrust laws if the city seeks to extend its monopoly:

> They [petitioners] suggest that to apply antitrust principles to local governments will necessarily interfere with the execution of governmental programs. We do not agree. Acting as agents at the direction of the State, local governments are free to implement state policies without being subject to the antitrust laws to the same extent as would the State itself . . . . On the other hand, it would not hinder governmental programs to require that cities authorized to provide services on a monopoly basis refrain from, for example, predatory conduct not itself directed by the State.
>
> Lafayette, supra, 435 U.S. at 406 n. 31 (emphasis added).

Further, it is clear here that the impetus for the anticompetitive provisions came not from the State but from the bond consultants the Defendants had hired. The result of the lower courts' decisions is that by authorizing issuance of revenue bonds, the legislature is fictionally presumed to have authorized whatever anticompetitive conduct individual bond consultants may see fit to impose, regardless of whether such conduct in fact comports with state policy. Such attempts

to put the "state action" imprimatur on what is essentially private decision making were rejected by this Court in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), and should not be condoned in the municipal arena.

Not only does the Eighth Circuit weaken antitrust standards by giving mere lip service to the "clearly articulated and affirmatively expressed" test, but also it dilutes them even more by holding that state supervision is generally not required for municipal conduct, a question this Court has not yet decided. Boulder, supra, 455 U.S. at 51 n.14. However, if "clear articulation and affirmative expression" of state policy to displace competition require only a possible inference that that policy exists, and no state supervision at all is needed, then at no time will there be any impartial, state-wide consideration of the potential impact the municipality's action may have on the rest of the state. Without a firmer standard for expression of state policy and without a requirement of active state supervision, the economic dislocation and regional inefficiencies that

concerned this Court in Lafayette would be permitted to occur.

The gravamen of the challenge here -- the monopolization not of landfills but of solid waste itself -- is that such monopolization affects surrounding areas. The economic survival of landfills in surrounding less populous areas that were previously serving Metro residents is imperiled. Moreover, the surviving customers and owners of landfills in the surrounding areas could be forced to bear the brunt of Metro's policy through increased rates or the loss of local landfill service. It is exactly this kind of extra-territorial impact of a municipality's policy that provided the basis for the Lafayette decision. This Court was unwilling to grant an automatic state action exemption to municipalities without affirmative direction by the state because a municipality might otherwise be furthering its own parochial interests without concern for the extra-territorial impact of its conduct. This Court stated:

> But the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to com-

port with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders.

* * * *

The decision to displace existing service, rather than being made on the basis of efficiency in the distribution of services, may be made by the municipality in the interest of realizing maximum benefits to itself without regard to extra-territorial impact and regional efficiency.

* * * *

When these bodies [units of local government] act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender. If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy

> Congress established. (Footnotes omitted).

City of Lafayette, 435 U.S. at 403-408.

The instant decision of the Eighth Circuit, contrary to Lafayette's instruction, has opened the door to market distortion and territorial aggrandizement by government subdivisions without any state involvement, input, or attention. To assume that any and all anticompetitive measures were "comprehended within the powers granted" merely because the end to be achieved is "important", to find that it is sufficient that anticompetitive measures could be "possibly inferred" from the authorized activity, and to require no state supervision renders this Court's state action cases meaningless. Astute counsel to municipalities within the Eighth Circuit's jurisdiction can justifiably reassure their clients that the probability of antitrust liability for any action they may take is negligible. Private enterprise, seeking to compete with local governments, will have no recourse for abuses of governmental power.

If Lafayette is to retain any kind of vitality and if municipalities and private enterprise are to understand its reach,

this Court should make clear how strong or tenuous must be the inference that the legislature contemplated the particular anticompetitive conduct and whether state supervision of such conduct is necessary in all events. This case invites that clarification of a matter of increasing national importance.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL.

This Court has specifically left open the question of whether active state supervision is required in order for municipalities to qualify for the state action exemption. Boulder, supra, 455 U.S. at 51 n.14. This case provides a timely opportunity to answer that question.

The circuit courts have been in conflict as to whether state supervision is required for government subdivisions. The Eighth and Seventh Circuits have held that the active supervision requirement does not apply to political subdivisions, as least when those subdivisions are performing "traditional government functions." Gold Cross Ambulance & Transfer & Standby Service, Inc. v. City

of Kansas City, 705 F.2d 1005, 1014-15 (8th Cir. 1983); Hallie v. City of Eau Claire, 700 F.2d 376, 384 (7th Cir. 1983).[3] The First Circuit has required state supervision. Corey v. Look, 641 F.2d 32, 36-37 (1st Cir. 1981). So has the Ninth Circuit. Ronwin v. State Bar of Arizona, 686 F.2d 692, 697 (9th Cir. 1981), cert. granted sub nom. Hoover v. Ronwin, 103 S.Ct. 2084 (1983); Charley's Taxi Radio Dispatch Corporation v. SIDA of Hawaii, Inc., 562 F.Supp. 712, 718-19 (1983).[4] The question of whether both

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[3]The Plaintiffs in both of these cases have filed petitions for writs of certiorari. Gold Cross was filed on July 25, 1983, docket number 83-138, and Hallie was filed May 11, 1983, docket number 82-1837. As of this writing neither petition has been granted nor denied. Because this case presents questions similar to those raised in Gold Cross and Hallie, it might be appropriate for this court to consider the three cases together.

[4]Also, the Iowa Supreme Court has indicated that active state supervision is required in order to exempt municipal conduct from the reach of the Iowa Competition Law. Neyens v. Roth, 326 N.W.2d 294 (Iowa 1982). In light of this a federal court should not be able to infer a policy to displace competition in the absence of supervision of the anti-competitive conduct.

parts of the Midcal state action test apply to governmental subdivisions should be determined by this Court once and for all.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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